In the

Supreme Court

of the

United States

Supreme Court, U.S.
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OCTOBER TERM, 1970

No. 1087

THE HONORABLE RICHARD KELLY,
CIRCUIT JUDGE,

Petitioner,

vs.

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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The Respondent, FLORIDA JUDICIAL QUALIFICATIONS COMMISSION, accepts the introductory statements in the Petition including Petitioner's "Statement of the Case" as it is amplified by the statement contained in the Report of the Respondent to the Supreme Court of Florida (Petitioner's B. 11) and by the statement contained in the opinion of the Supreme Court of Florida. (Petitioner's A. 13)

The discussion contained in this Brief will be directed to the questions presented to this Court by the Petition and in that order.

I

Petitioner would have this Court consider as the sole basis of his reprimand the written Petition which he, as Circuit Judge and not as an individual, filed with the Clerk of the Sixth Judicial Circuit in Pinellas County, Florida, on April 5, 1968, addressed to The Judges of the Sixth Judicial Circuit. (Petitioner's A. 1) While this Petition contains statements certainly unbecoming a member of the Judiciary and directed toward other members of the same Judiciary, it is not this Petition alone which resulted in the charges and later reprimand of Petitioner. This Petition merely is the final, concrete and overt act of Petitioner culminating his unacceptable conduct and evidencing his attitude toward his fellow Judges, court attaches, and others, in considering himself above and beyond that which is expected of a member of the Judiciary. Contrary to the Petitioner's contention that he was reprimanded solely for his "activities" of the filing of the April 5, 1968 Petition, the Supreme Court of Florida indicated the extent of the evidence it considered in arriving at its conclusion and summarized it in its opinion (Petitioner's A. 17):

> "The evidence is replete with instances in which the judicial temperament of petitioner was lacking. Nineteen of the approximately twenty-one lawyers of Pasco County were willing to, and did, sign a petition for the impeachment of Judge Kelly; seven lawyers left Dade City in Pasco

> County because of Judge Kelly; many cases ordinarily filed in Pasco County were filed out of the county because of Judge Kelly; attorneys and court personnel were fearful of Judge Kelly; he was rude and inconsiderate of attorneys and court personnel. His erratic behavior culminated in the filing of the petition."

Although the Respondent considers the filing of the Petition itself an unorthodox procedure not necessarily countenanced by or falling within normal judicial conduct, in order for this Court to be fully apprised of the situation, it must consider the whole picture — the woven fabric of the circumstances, the actions of the Petitioner, and his relationship with others with whom he came in contact as a member of the Judiciary. A consideration of the evidence presented to the Respondent Commission will indicate the unorthodox and charged atmosphere of the Court over which the Petitioner presided, the complete disregard for the feelings of individuals employed in or appearing before that Court and the Petitioner's overriding concern with his own self-interest. The findings of the Respondent Commission as adopted by the Supreme Court of Florida should be considered in the light of the total picture surrounding the Petitioner and prevailing at the time of the filing of that Petition on April 5, 1968.

Respondent does not in any way question the right of a Judge to speak publicly for reform in judicial administration and, in fact, would consider it the duty of such an individual. However, such must be done within the framework of judicial procedures and the accepted methods of conduct leading to that end. As was reflected in this proceeding, the Petitioner was well acquainted with the "gen-

erally accepted methods" and the rules providing for the institution of change in judicial administration, since on other occasions in the past he had successfully argued his views in obtaining such reform and, therefore, knew of its workability. Without conceding the propriety of an attempt such as was made by the Petitioner, at any time, it would at least be somewhat more understandable had the Petitioner exhausted the established remedies authorized for proposed judicial reform unsuccessfully before attempting such action but, in view of his knowledge of the procedures, to callously disregard them in this manner is, in the opinion of the Respondent, inexcusable.

In *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.ed. 1295 (1945) (Frankfurter, J. concurring) it was stated that:

> " . . . (I)n a series of decisions which presented most sharply the constitutional extent of freedom of speech, this Court had held that the Constitution did not allow absolute freedom of expression —a freedom unrestricted by the duty to respect other needs fulfillment of which makes for the dignity and security of man. *Schenck v. United States*, 249 U.S. 47; *Frohwerk v. United States*, 249 U.S. 204; *Debs v. United States*, 249 U.S. 211."

This certainly is applicable to the argument presented here by the Petitioner concerning his right to freedom of speech and the action taken by the Supreme Court of Florida. Although unquestionably the ultimate bulwark of freedom in a democracy, the Judiciary is equally a delicate mechanism which must depend upon the respect and obe-

dience of the general populace to its pronouncements in order to effectively protect the rights of individuals, as well as, the rights of society. Courts, generally, are equipped with procedures to protect themselves against outsiders and have available to them whatever measures are necessary to insure the proper respect and require obedience to their mandates. However, when criticism comes from within, the Courts are powerless to protect themselves, particularly when such criticism comes from one who is generally popular with the electorate. The Petitioner's freedom of speech cannot be freedom from any responsibility whatsoever in its exercise.

Petitioner relies heavily on this Court's pronouncements in *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.ed. 2d 569 (1962); *Craig v. Harney*, 31 U.S. 367, 67 S.Ct. 1249, 91 L.ed. 1546 (1946); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.ed. 1295 (1945); *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.ed. 192 (1941).

In the opinion of the Court in *Craig v. Harney*, supra, at page 373, referring to *Bridges v. California*, supra, and *Pennekamp v. Florida*, supra, the Court stated:

> "Neither those cases nor the present one raises questions concerning the full reach of the power of the state to protect the administration of justice by its Courts. The problem presented is only a narrow, albeit important, phase of that problem —*the power of a court promptly and without a jury trial to punish for contempt on cases pending before it and waiting disposition.*" (emphasis supplied)

In *Wood v. Georgia*, supra, this Court was also concerned with the Court's power of contempt. These cases establish the limitations of the Court's power to punish by contempt. Had the other judges of the Sixth Judicial Circuit or the Supreme Court of Florida attempted to "punish" the Petitioner through the use of the contempt power, these cases would certainly be applicable, but such is not the situation that is presented to this Court and the holdings of these cases certainly cannot be considered as controlling in this judicial disciplinary proceeding. Nor is it necessary that the Supreme Court of Florida find that the actions of the Petitioner create a clear and present danger of the disruption of the administration of justice as is required by the cases cited by the Petitioner.

Any consideration by this Court of this matter should not be concerned with Petitioner's right of freedom of speech or with the contents of his writings but actually whether the methods used by the Petitioner and the turmoil created by his actions are to be considered as conduct unbecoming a member of the Judiciary and contrary to the Canons of Judicial Ethics. As the Supreme Court of Florida so aptly stated,

> "He cannot avoid the resulting inquiry as to his motive and methods by invoking the right of freedom of speech in this disciplinary proceeding. We are not concerned with his right to speak, but whether his motive or method does violence to the Canons of Judicial Ethics." (Petitioner's A. 21)

Constitutional guarantees cannot be considered academically, theoretically or abstractly, but must be considered in the light of methods and motives used by the actor since the guarantees are applicable only to individ-

uals exercising them in given circumstances. No one may exercise an absolutely unrestricted right to criticize as this Court has consistently recognized. In circumstances such as these where Petitioner is the holder of a high judicial office, consideration must be given to the welfare of the public and its interest in the maintenance of a high degree of respect and regard by the public for its Judiciary. Of course, there can be no question of the public's right to know about possible defects in its judicial administration, however, due consideration must be given for the maintenance of the integrity of the system as a whole and the right of an individual within the system to criticize its administration must be tempered by the public interest in the maintenance of the integrity of the system. Although individual freedom of expression is a basic tenet of our system of government, so also must be the continued existence of the system itself.

Petitioner has consistently referred to the action taken by the Supreme Court of Florida and this Respondent as "punishment" in an apparent attempt to place a greater burden upon the Respondent and, consequently, upon the Court to find "guilt" in this proceeding. Proceedings such as these are not penal in nature in that they impose no punishment for an offense against the people. They are, in fact, remedial in that they allow the people to consider the qualifications of those serving in high positions of public trust and to retain in the Judiciary only those individuals who are qualified to serve in such position. No punishment is imposed but rather those legal consequences follow which are necessarily attached to the discipline or disqualification of a person holding judicial office. These matters must be considered in light of the situation which actually exists and not in the context which Petitioner would thrust upon these proceedings to suit his own end.

II

Petitioner also complains of a denial of procedural due process accorded him by the action of the Respondent Commission which was considered and approved by the Supreme Court of Florida. There is no complaint, however, that the Respondent failed to comply strictly with the provisions set forth in Article V of Section 17 A(3) of the Florida Constitution or of the Rules of the Florida Judicial Qualifications Commission published at 207 So.2d 443, nor is there any basis for such a complaint. In *Barsky v. Board of Regents of N. Y.*, 347 U.S. 442, 74 S.Ct. 650, 98 L.ed. 829, this Court stated:

> "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. . . . It has established detailed procedures for investigations, hearings and reviews with ample opportunity for the accused practitioner to have his case thoroughly considered and reviewed."

Certainly it is equally elemental that a state has such broad power to establish and enforce standards of conduct within its judiciary since nothing could be more vital to the citizens of a state than the maintenance of a high degree of professional conduct within the judiciary.

Neither can there be any substance to the claim of the Petitioner that he has been denied adequate notice or opportunity to be heard since this matter was thoroughly and completely considered by the Respondent Commission with ample opportunity to the Petitioner to present what-

ever evidence he wished to present to the Commission for its consideration, the record fully and accurately transcribed and presented for review to the Supreme Court of Florida with the recommendation of the Respondent Commission. Petitioner, again, had a full opportunity to present argument in his behalf before the Supreme Court of Florida.

As Petitioner concedes at the conclusion of the Petition, "the development of modern machinery for inquiring into judicial conduct is a vital part of our contemporary legal history. Errant judicial conduct should be dealt with promptly." Respondent certainly agrees with this statement, however, it is equally vital that obstreperous individuals such as the Petitioner be thwarted in attempts to make shambles of any process which in any way sets standards of conduct with which they disagree. Even the processes of impeachment of judicial officers, depend upon a consideration of the acts of those members of the Judiciary by persons other than members of the Judiciary and, for that reason, it is imperative that the Judiciary have the right to protect itself from improper action by one of its own through such proceedings as these. However, if the disciplinary action which the Respondent Commission may take is restricted to the corrupt, senile or insane, there is little need for such a disciplinary body since other methods exist for the handling of such matters.

The people of Florida have expressly provided in their Constitution the basis for this procedure, followed and approved by the highest Court of the State of Florida — must this Court hold that such procedure as authorized by that constitutional provision collides with Petitioner's rights under the Constitution of the United States? Respondent thinks not.

As recently as March, 1969, this Court has declined to review a similar proceeding against the County Judge by the Court of the Judiciary of Oklahoma, Appellate Division, when that Judge complained of the denial of his basic constitutional right to a trial by jury. *Sharpe v. State ex rel, Oklahoma Bar Association*, 448 P. 2d 301, Cert. Denied, 394 U.S. 904, 89 S.Ct. 1011. Obviously, this attack against the proceedings strikingly similar to those in that case involve no more basic constitutional rights.

Proceedings such as those involved in this case are authorized and are being actively pursued in their duties and responsibilities in the following states: Alaska, California, Colorado, Delaware, Florida, Idaho, Illinois, Louisiana, Maryland, Michigan, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah and the District of Columbia. Surely, procedures as widespread as this can involve no threat to nor denial of an individual's right of procedural due process and are in the best interests of our system of government.

CONCLUSION

The constitutional guarantees to the individual must be maintained and preserved in order for our system of government to survive and this Court has always been the unswerving defender of such rights, but it must equally recognize that such rights may be exercised only within our system of government in order for that system to be maintained and preserved. The right of the people of Florida to demand high standards of professional and judicial qualification and ethical conduct cannot be denied them by the Petitioner. Conversely, the people of Florida have not denied to the Petitioner any right which he may lawfully exercise.

For these reasons this Court should deny the Petition for Writ of Certiorari sought by the Petitioner.

Respectfully submitted,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition have been furnished by United States Mail, postage prepaid, to the Honorable John W. Boult, attorney for Petitioner, Fowler, White, Gillen, Humkey & Kinney, P.A., post office box 1438, Tampa, Florida, 33601 and to the Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32302, this day of January, 1971.

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